(3)

FILED
AUG 30 1994
OFFICE OF THE CLERK

No. 93-1841

In The

Supreme Court of the United States

October Term, 1994

ADARAND CONSTRUCTORS, INC.,

Petitioner,

v.

FEDERICO PENA, Secretary of Department of Transportation; THOMAS D. LARSEN, Administrator of the Federal Highway Administration; LOUIS N. MACDONALD, Administrator Region VIII of the Federal Highway Administration; and JERRY BUDWIG, Division Engineer of the Central Federal Lands Highway Division,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

REPLY TO OPPOSITION

WILLIAM PERRY PENDLEY*
*Counsel of Record
TODD S. WELCH
Mountain States Legal Foundation
1660 Lincoln Street, Suite 2300
Denver, Colorado 80264
(303) 861-0244

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

13 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. THE STATUTE IN QUESTIONS CREATES A RACE-BASED CLASSIFICATION THAT USES RACE AS THE DECIDING FACTOR IN ESTABLISHING GOALS 1

II. STRICT SCRUTINY, NOT INTERMEDIATE SCRUTINY AS HELD BY THE TENTH CIRCUIT COURT OF APPEALS, IS THE STANDARD OF REVIEW THIS COURT REQUIRES FOR A RACE-BASED STATUTE 5

iii. "SOCIETAL DISCRIMINATION" CITED BY CONGRESS DOES NOT PROVIDE SUFFICIENT AUTHORITY TO JUSTIFY THE USE OF A RACE-BASED PROGRAM BY FEDERAL OFFICIALS IN COLORADO 7

IV. PRIVATE DISCRIMINATION IS "EVIL" AND JUST AS "ODIOUS TO A FREE PEOPLE" AS IS GOVERNMENTAL DISCRIMINATION 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Bolling v. Sharpe, 347 U.S. 497 (1954) 6, 7

Fullilove v. Klutznick, 448 U.S. 448 (1980) 5, 7

Hirabayashi v. United States, 320 U.S. 81 (1942)..... 9

Korematsu v. United States, 323 U.S. 214 (1944).....5, 6

Metro Broadcasting v. FCC, 497 U.S. 547 (1990)... 5, 6, 7

Regents of the University of California v. Bakke, 438 U.S. 265 (1978) 4, 6, 9

Richmond v. J.A. Croson, 488 U.S. 469 (1989) 7, 8, 9

Virginia v. Loving, 388 U.S. 1 (1967) 5, 6

Wygant v. Jackson Board of Education, 476 U.S. 267 (1986) 7, 8

STATUTES AND REGULATIONS

15 U.S.C. § 631(f)..... 8

15 U.S.C. § 637(a) 2

15 U.S.C. § 637(a)(5)..... 3

15 U.S.C. § 637(a)(6)..... 3

15 U.S.C. § 637(d)(3)(C)..... 4

49 C.F.R. § 23.69..... 4

49 C.F.R. Pt. 23, Subpt. D, App. A..... 4

49 C.F.R. Pt. 23, Subpt. D, App. C..... 3

No. 93-1841

In The

Supreme Court of the United States

October Term, 1994

ADARAND CONSTRUCTORS, INC.,

Petitioner,

v.

FEDERICO PENA, Secretary of Department of Transportation; THOMAS D. LARSEN, Administrator of the Federal Highway Administration; LOUIS N. MACDONALD, Administrator Region VIII of the Federal Highway Administration; and JERRY BUDING, Division Engineer of the Central Federal Lands Highway Division,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

REPLY TO OPPOSITION

ARGUMENT

I. THE STATUTE IN QUESTION CREATES A RACE-BASED CLASSIFICATION THAT USES RACE AS THE DECIDING FACTOR IN ESTABLISHING GOALS.

Respondents assert that "[a]lthough the Small Business Act employs race as a factor, its goals are not based on race, but on disadvantage. . . . [and that t]here is no question on the record in this case that Gonzales was in

fact disadvantaged, and petitioner was not."[1] Respondents further aver: "Section 8(a) of the Act, 15 U.S.C. § 637(a), defines social and economic disadvantage in race-neutral terms."[2] From this "factual" predicate, Respondents argue:

> Indeed, if [Adarand] were a [Disadvantaged Business Enterprise] DBE similarly situated to Gonzales in every way but the race of the persons who own and operate [Adarand] and had made a lower bid than Gonzales, [Adarand] would, no doubt, have been awarded the subcontract.[3]

Respondents' argument fails because its "factual" foundation is simply untrue. The Small Business Act not only employs race as a factor, race is the only factor. That is, an individual is presumed to be disadvantaged if his race is one of those listed in the Small Business Act. Moreover, there is no evidence "on the record" that Gonzales is disadvantaged, only that he is Hispanic, which is one of the races listed as presumably disadvantaged. Furthermore, the Small Business Act does not define disadvantage in "race-neutral terms" but in racial terms since those of the listed races are presumed to be "disadvantaged." Finally, even if Adarand were able to apply for and receive DBE status, the Small Business Act is constitutionally deficient since racial minorities need not demonstrate that they are disadvantaged to be certified as DBEs. Racial minorities need show only that their race is one of those listed as presumptively disadvantaged in the Small Business Act.

---

[1] Opp. to Pet. 11-12.

[2] Opp. to Pet. 3, n.3.

[3] Opp. to Pet. 11.

Thus, as to the express provisions of the Small Business Act, Respondents are in error. Respondents' argument that the statutory scheme has a "racial component, but is not exclusively race-based" is without a factual basis. The payment of the bonus to the prime contractors in accordance with the Subcontracting Compensation Clause (SCC) turns upon the race of the subcontractor and upon no other factor.[4] This is clear from the statutory definition of "social and economic disadvantage":

> Socially disadvantaged individuals are those who have been subjected to *racial or ethnic prejudice or cultural bias because of their identity as a member of a group* without regard to their individual qualities.

15 U.S.C. § 637(a)(5). (Emphasis added.) "Economically disadvantaged" means:

> *those socially disadvantaged individuals* whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged.

15 U.S.C. § 637(a)(6). (Emphasis added.) Thus, only individuals who are "socially disadvantaged," that is, of certain specified racial and ethnic status can be "economically disadvantaged."[5]

---

[4] Opp. to Pet. 3.

[5] "Recipients should always make a determination of social disadvantage before proceeding to make a determination of economic disadvantage. *If the recipient determines that the individual is not socially disadvantaged, it is not necessary to make the economic disadvantage determination.*" 49 C.F.R. Pt. 23, Subpt. D, App. C. (Emphasis added.)

This Court has held that a racial classification is "a line drawn on the basis of race and[/or] ethnic status,"[6] and that the constitutional guarantee of equal protection is violated if persons of different races "are not accorded the same protection."[7] The statute in question is clearly race-based because it establishes classifications and draws lines on the basis of race or ethnic status and no other basis.

Moreover, the fallacy of the argument that the Small Business Act is based upon race-neutral definitions is obvious. A statutorily listed minority member obtains DBE status merely by proving his or her membership in one or more of the presumed disadvantaged minorities.[8] "In making certification decisions, the recipient relies on this presumption, and does not investigate the social or economic status of individuals who fall into one of the presumptive groups."[9] Nothing else is required.[10]

---

[6] *Regents of the University of California v. Bakke*, 438 U.S. 265, 289 (1978).

[7] *Id.* (Emphasis added.)

[8] The statutorily presumed disadvantaged minorities are: "Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities." 15 U.S.C. § 637(d)(3)(C).

[9] 49 C.F.R. Pt. 23, Subpt. D, App. A, at page 216 (10-1-92 Edition).

[10] Respondents are disingenuous when they assert that the DBE status of a minority can be "rebutted if it is shown, based on information provided from any source, that 'the firm's owners are not truly socially and/or economically disadvantaged.' " Opp. to Pet. 6. What Respondents fail to explain is that the burden to "rebut" the DBE status of an individual is placed upon third parties, not the governmental agency. 49 C.F.R. § 23.69. Thus, the party challenging the DBE status of an individual must provide the evidence that the challenged minority is not "socially and economically disadvantaged." The burden is on the wrong party. The party seeking to be benefitted by the program should have the burden of proving, not just his or her race or ethnic origins, but the nature of his or her "social" and/or "economic disadvantage."

The Small Business Act is race-based and Respondents' attempts to portray it as otherwise are without merit.

II. STRICT SCRUTINY, NOT INTERMEDIATE SCRUTINY AS HELD BY THE TENTH CIRCUIT COURT OF APPEALS, IS THE STANDARD OF REVIEW THIS COURT REQUIRES FOR A RACE-BASED STATUTE.

Respondents failed to respond to Adarand's arguments that neither *Fullilove v. Klutznick*, 448 U.S. 448, 545 (1980) nor *Metro Broadcasting v. FCC*, 497 U.S. 547, 601 (1990) provide the necessary authority to overrule the Court's previous holdings that "the most rigid scrutiny" must be applied when race is the primary factor in government decision making.[11] Therefore, the proper standard is "strict scrutiny."[12]

Respondents argue that "*Fullilove* did not employ strict scrutiny, nor is such scrutiny appropriate here."[13] Respondents are wrong on both counts. *Fullilove* held that "careful judicial evaluation," "narrow tailoring" and "most searching examination" must be utilized when reviewing race-based programs.[14] These are the characteristics of strict, not intermediate scrutiny.

---

[11] *Korematsu v. United States*, 323 U.S. 214, 216 (1944) and *Virginia v. Loving*, 388 U.S. 1, 11 (1967).

[12] Pet. at 12-13.

[13] Opp. to Pet. 12.

[14] *Fullilove*, 448 U.S. at 480 and 491.

Contrary to the contention of Respondents, strict scrutiny must be applied in this case. This Court has held that "the most rigid scrutiny" must be applied to racial classifications. *Korematsu v. United States*, 323 U.S. 214, 216 (1944). *See* also *University of California Regents v. Bakke*, 438 U.S. 265, 299 (1978); *Virginia v. Loving*, 388 U.S. 1, 11 (1967); and *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954). Respondents' attempt to show otherwise fails.

Respondents cite *Metro Broadcasting* as authority for the proposition that intermediate scrutiny is the appropriate standard of review. Yet, Respondents cannot rely upon *Metro Broadcasting* since that Court appears to hold that strict scrutiny is the proper standard to be applied in this case.[15] In *Metro Broadcasting* Justice Stevens wrote a concurring opinion in which he expressed concern regarding the standard of review. Obviously, Justice Stevens believed – while supporting the holding of the Court – that "strict scrutiny" should be applied, in all but a very limited number of cases. Justice Stevens' concurrence in *Metro Broadcasting* and his dissent in *Fullilove* clearly set forth his view on the proper standard:

> [u]nless Congress *clearly articulates the need* and basis for a racial classification, and also *tailors the classification to its justification*, the Court should not uphold this kind of statute.

---

[15] As explained in text, Justice Stevens' concurring opinion in which he addresses the appropriate standard of review when combined with the four dissenting Justices who also favored strict scrutiny constitutes a majority of the Court. *Metro Broadcasting*, 497 U.S. at 603 (dissent of Justice O'Connor) and 633 (dissent of Justice Kennedy). Furthermore, as explained in Adarand's Petition, important constitutional precedent must not be overruled by implication. Pet. 20-21

Fullilove, 448 U.S. at 545. (Emphasis added.) "Clearly articulates the need and basis" and "tailors the classification to its justification" are the same as the compelling governmental interest and the narrow tailoring tests required under strict scrutiny.[16] Justice Stevens' views on the proper standard of review are clear from his opinion in *Metro Broadcasting*:

> racial or ethnic characteristics provide a relevant basis for disparate treatment *only in extremely rare situations* and that it is therefore "especially important that the reasons for any such classification be clearly identified and *unquestionably legitimate*."

Metro Broadcasting, 497 U.S. at 601. (Emphasis added.) Contrary to Respondents' assertion, Justice Stevens has never held – neither in *Fullilove* nor *Metro Broadcasting* – that intermediate scrutiny is the proper standard to apply when reviewing a race-based classification.

III. "SOCIETAL DISCRIMINATION" CITED BY CONGRESS DOES NOT PROVIDE SUFFICIENT AUTHORITY TO JUSTIFY THE USE OF A RACE-BASED PROGRAM BY FEDERAL OFFICIALS IN COLORADO.

Respondents argue that "Congress made express findings of disadvantage experienced by members of minority groups that support the presumptive inclusion

---

[16] "There are two prongs to this examination. . . . First [it] 'must be justified by a compelling governmental interest' [and] [s]econd it must be 'narrowly tailored to the achievement of that goal.'" *Wygant v. Jackson Board of Education*, 476 U.S. 267, 274 (1986). *See* also *Metro Broadcasting v. FCC*, 497 U.S. at 603, (dissenting opinion of Justice O'Connor, citing *Richmond v. J.A. Croson*, 488 U.S. 469 (1989) and *Bolling v. Sharpe*, 347 U.S. 497 (1954).

of businesses owned by such persons in the preference for disadvantaged business. 15 U.S.C. § 631(f)."[17]

Respondents admit that the Central Federal Lands Highway Division (CFLHD) has never discriminated on the basis of race.[18] Yet, Respondents take the position that "societal discrimination" is sufficient to justify the use of a race-based program by that agency in Colorado. However, this Court has held that "societal discrimination" is not enough:

> This Court *never has held that societal discrimination alone is sufficient to justify a racial classification*. Rather, the court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to *remedy* such discrimination.

Wygant, 476 U.S. at 274. (Emphasis added.) The reason is simple, "it is almost impossible to assess whether [this] plan is narrowly tailored to remedy prior discrimination since it is not linked to identified discrimination in any way." *Croson*, 488 U.S. at 498.

"Societal discrimination" cited by Congress does not provide sufficient constitutional authority to justify the

---

[17] Opp. to Pet. 15. Even if Congress made findings with the specificity this Court demands, and it did not, those findings were made nearly a decade ago. If there was a pattern of race-based discrimination – and Respondents have testified there was not – the defect has been long cured. Thus, what is present here is a remedy that is "ageless in [its] reach into the past, and timeless in [its] ability to affect the future." *Wygant*, 476 U.S. at 276.

[18] In a deposition taken on March 19, 1991, Mr. Jerry Budwig, Division Engineer of the CFLHD testified "I would say that there has not been," when asked if he knew if the CFLHD had ever discriminated. App. 45-46.

use of a race-based program by Federal Officials in Colorado. The decision of the Tenth Circuit is in error, conflicts with the holdings of this Honorable Court, and must be reversed.

IV. PRIVATE DISCRIMINATION IS "EVIL" AND JUST AS "ODIOUS TO A FREE PEOPLE" AS IS GOVERNMENTAL DISCRIMINATION.

Respondents argue that the race-based program does not require a waiver provision because the SCC "operates as a carrot rather than a stick."[19] Respondents argue that bribing a prime contractor with federal funds to discriminate is less constitutionally offensive than direct discrimination by the government entity itself. Private discrimination is "evil."[20] Respondents' attempt to hide behind the prime contractor, asserting that it is he and not the federal government which is discriminating on the basis of race, is meritless and must be rejected. Since federal funds provide the financial inducement to discriminate in accordance with federal regulations, the discrimination is being done by the federal government. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."[21] Government financing of private discrimination is "evil" and no less "odious to a free people whose institutions are founded upon the doctrine of equality"

---

[19] Opp. to Pet. 18.

[20] "It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private discrimination." *Croson*, 488 U.S. at 492.

[21] *Bakke*, 438 U.S. at 290-91, citing *Hirabayashi v. United States*, 320 U.S. 81, 100 (1942).

since it is direct discrimination by the government itself. The decision of the Tenth Circuit Court of Appeals is in direct conflict with the decisions of this Court and it must be reversed.

CONCLUSION

Respondents have failed to provide any cogent reason for rejecting Adarand's request that this Court review and reverse the decision of the Tenth Circuit Court of Appeals. Therefore, Adarand's Petition for *Writ of Certiorari* should be granted.

Respectfully submitted,

WILLIAM PERRY PENDLEY*
*Counsel of Record
TODD S. WELCH
Mountain States Legal Foundation
1660 Lincoln Street, Suite 2300
Denver, Colorado 80264
(303) 861-0244

Attorneys for Petitioner

DATED: August 30, 1994